No. 84-1070

IN THE

Supreme Court of the United States

October Term, 1984

LARRY WITTERS,

Petitioner,

v.

STATE OF WASHINGTON
COMMISSION FOR THE BLIND,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Washington

---

BRIEF OF THE AMERICAN JEWISH COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

SAMUEL RABINOVE
THE AMERICAN JEWISH COMMITTEE
165 East 56 Street
New York, New York 10022
(212) 751-4000
Attorney for *Amicus Curiae*

Of Counsel:
JED S. RAKOFF
JAMES NISS
ELLEN B. COHN

RICHARD T. FOLTIN
The American Jewish Committee

QUESTION PRESENTED

Whether the Establishment Clause prohibits a governmentally–funded vocational rehabilitation program from providing financial vocational assistance to an otherwise–eligible blind student who intends to use the assistance in studying for a career as a Christian pastor, missionary, or youth director.

STATEMENT OF INTEREST

The American Jewish Committee (AJC), as *amicus curiae*, respectfully submits this brief supporting reversal of the decision below.

The American Jewish Committee, a national organization of approximately 50,000 members founded in 1906, is dedicated to the defense of the civil rights and religious liberties of American Jews. AJC is committed to the belief that separation of religion and government is the surest guarantee of religious liberty. Nevertheless, AJC believes that the Establishment Clause should not be interpreted so as to exclude religiously–oriented persons from the benefits of state–supported assistance programs solely because the provision of such assistance may provide financial benefit to a religious institution of higher education. In the long run, such a view of the scope of the Establishment Clause would do nothing to strengthen the separation between church and state. Rather, it would serve only to deprive otherwise qualified individuals from governmental benefits to which they would be entitled, thereby substantially undercutting the legitimate secular aims of the government assistance programs themselves.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 84–1070

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

LARRY WITTERS,

Petitioner,

v.

STATE OF WASHINGTON COMMISSION FOR THE BLIND,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF THE AMERICAN JEWISH COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This brief is submitted with the consent of the parties.

Originals of the letters reflecting such consent are being filed with the Clerk of the Court simultaneously with the filing of this brief.

STATEMENT OF THE CASE

The State of Washington, through Respondent Commission, subsidizes (in conjunction with the federal government) vocational training for the blind by paying tuition and living expenses while participants receive "training in the professions, business or trades." Petitioner Larry Witters applied for such aid in connection with his attendance at a Christian religious college with the vocational goal of becoming a Christian "pastor, missionary or youth director." The Commission denied his application on the ground that to provide such assistance would constitute support for religious studies in violation of the Washington State Constitution.

In the judgment under review here, the Washington Supreme Court, without reaching the question of state law, affirmed the Commission's action on the ground that state support for Petitioner's "career goal of becoming a minister" was prohibited by the Establishment Clause of the First Amendment to the United States Constitution, particularly because its primary effect was to advance religion in violation of the second prong of the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The decision of the Washington Supreme Court is reported at 102 Wn.2d 624, 689 P.2d 53 (1984). The prior judicial and administrative proceedings are not reported.

SUMMARY OF ARGUMENT

The *amicus* here has a long history of supporting strict separation of church and state. But, in our view, the State of Washington's grant to Petitioner of the same aid for vocational training as it grants to all blind applicants would not violate the Establishment Clause merely because Petitioner has chosen vocational training to become a Christian minister.

The Washington Supreme Court has misconstrued the limitations upon state action set by the Establishment Clause. This Court has consistently held that state programs open to a broad class of non-religious as well as religious beneficiaries do not have a primary effect of advancing religion solely because individual participants choose to utilize those programs in furtherance of their religious beliefs. *Mueller v. Allen*, ___ U.S. ___, 103 S.Ct. 3062, 3068–69 (1983); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981); *Everson v. Board of Education*, 330 U.S. 1, 18 (1947). The contrary result arrived at here by the Washington Supreme Court penalizes that small group of handicapped students who elect to pursue religious studies, in a fashion that is not mandated by the strong state interest in maintaining the separation of church and state.

The constitutional analysis of the Washington Supreme Court errs in three major respects. First, it relies entirely on cases dealing with direct aid to sectarian schools, while virtually ignoring this Court's decisions regarding aid to individuals. This Court has upheld aid to individuals in every recent case except one, *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). The cases on aid to individuals, including *Nyquist*, set a clear line of demarcation: whereas "ingenious plans for channelling state aid to sectarian schools" through individuals are unconstitutional, *id.*, 413 U.S. at 785, religious use by some individuals of aid made available to a "broad spectrum of citizens" (such as the blind) does not offend the Establishment Clause. *Mueller v. Allen*, *supra*, 103 S.Ct. at 3069.

The Washington Supreme Court erred also in its improper focus on Petitioner's individual vocational choice (rather than on the state program of aid to the blind as a whole) in determining whether the questioned state action has a primary effect of advancing religion. The controlling precedent of this Court holds that occasional religious use of a broadly available state program is an "incidental" and not

a "primary" religious effect, and thus is no violation of the Establishment Clause. *Widmar v. Vincent*, *supra*, 454 U.S. at 274.

Finally, the Washington Supreme Court failed to weight properly the fact that aid sought by Petitioner would be used to attend an institution of higher education rather than a primary or secondary school. The considerations that have led this Court to find a violation of the Establishment Clause have often turned on the distinction between these types of religious institutions. *See Widmar v. Vincent*, *supra*, 454 U.S. at 274 n.14; *Tilton v. Richardson*, 403 U.S. 672, 685–86 (1971).

Petitioner also asks this Court to hold that the state's denial of grants for vocational training for the ministry — while providing them for any secular trade or profession — violates the Free Exercise Clause. It is unnecessary, however, for this Court to reach the Free Exercise issue. The Commission's sole ground for denying Petitioner's application was its view that such a grant is prohibited by the state constitution. Petitioner properly raised the state–law issue below, but the Washington Supreme Court, diverted by its erroneous analysis of the United States Constitution, failed to decide it. This Court should vacate the judgment below on the federal question and remand for a determination of Petitioner's eligibility under state law.

ARGUMENT

The Establishment Clause Does Not Preclude The State From Offering Financial Vocational Assistance To All Handicapped Students Including Those Who Use Such Funds To Study For A Religious Vocation.

Under the stipulated facts, the State of Washington sought to further its neutral, secular, and wholly laudatory purpose of providing vocational assistance to blind students by helping to subsidize, with state and federal funds, academic training for vocations of virtually all kinds. Petitioner Witters, although meeting the medical and physical eligibility requirements for receipt of such assistance, was denied the assistance solely because he intended to pursue academic training at a sectarian institution in preparation for a career as a Christian pastor, missionary, or youth director. Although such denial was initially premised on an interpretation of the Washington State Constitution, the Supreme Court of the State of Washington (the "Washington Court"), in affirming the denial, grounded its decision on the Establishment Clause of the First Amendment. The Washington Court's analysis of the Establishment Clause is contrary to this Court's pertinent precedents.

The Washington Court properly pursued its analysis under the familiar three–part test of *Lemon v. Kurtzman*, *supra*, 403 U.S. at 612–13: that the statute have a secular legislative purpose, that its principal or primary effect be one that neither advances nor inhibits religion, and that it not foster "an excessive government entanglement with religion." As the Washington Court conceded, a finding that the first test had been met in this case was "quite easy," since the obvious purpose of the state aid program, as stated in the statute itself, was "to assist visually handicapped persons to overcome vocational handicaps and to obtain the

maximum degree of self–support and self–care." 102 Wn.2d 624, 628, 689 P.2d 53, 56 (1984) (citing Revised Code of Washington 74.16.181).

But the Washington Court found that the second test of *Lemon* — that the primary effect must be one that neither advances nor inhibits religion — was not met in this case. The Washington Court admitted that the statute itself and the assistance program as a whole did not primarily advance religion; but it held that the primary effect of the assistance given to Petitioner — "'the only transaction presently before us'" (quoting *Hunt v. McNair*, 413 U.S. 734 (1973)) — was to advance religion, since the assistance was to be used "to pay for the religious education of future ministers." 102 Wn.2d at 628–29, 689 P.2d at 56. The Washington Court's conclusion was erroneous for several reasons.

First, the Washington Court disregarded this Court's well–settled distinction between government programs of assistance to religious institutions and government programs of assistance to individuals. If the primary effect of a government assistance program is to channel state aid to religious institutions, then it offends the Establishment Clause, even if the aid is channelled indirectly, via individuals. *Committee for Public Education v. Nyquist*, *supra*, 413 U.S. at 785. But if the primary effect of a government assistance program is to channel aid to individuals for some secular purpose, there is no violation of the Establishment Clause, even if some religious institution is a beneficiary of such aid. *Mueller v. Allen*, *supra*.

Ignoring this distinction, the Washington Court relied on two inapposite cases: *Hunt v. McNair*, *supra*, and *Roemer v. Board of Public Works*, 426 U.S. 736 (1976). Both cases involved government aid directed to religion–sponsored institutions of higher learning, rather than to individuals. And even then, the Court upheld the constitutionality of the direct aid given in both *Hunt* and

Roemer, on the ground that the religion–sponsored colleges in question were not "pervasively sectarian." Far more directly on point are this Court's decisions regarding aid to individuals, in nearly every one of which the Court has upheld such aid. Most recently, for example, in *Mueller v. Allen*, *supra*, the Court upheld a Minnesota statute allowing state taxpayers to deduct expenses incurred in providing tuition, text books and transportation for their children attending an elementary or secondary school. In so holding, the Court emphasized, first, that the deduction was available to all taxpayers, not just those sending their children to parochial schools (as in *Nyquist*, *supra*),[1] and, second, that the aid in question was directed primarily to the taxpayers and only incidentally to the institutions, including religious institutions, that sponsored the schools. As the Court stated: "the historic purposes of the [Establishment] clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case." *Mueller*, *supra*, 103 S.Ct. at 3069. This conclusion applies, *a fortiori*, to the present case, where, even more than in *Mueller*, a neutral benefit is provided (payment of educational expenses for the visually handicapped) which only incidentally results in benefit to a religious institution.

The Washington Court erred also in its focus on Petitioner's individual vocational choice (rather than on the state program of aid to the blind as a whole) in determining whether the questioned state action has a primary effect of advancing religion. This narrow focus, which the

---

1 In *Nyquist*, this Court specifically noted that its invalidation of state tuition grants there did not mean that the Court would necessarily also hold unconstitutional aid to religious institutions in "a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian–nonsectarian or public–nonpublic nature of the institution benefitted." 413 U.S. at 782 n.38.

Washington Court wrongly believed was mandated by *Hunt* (a decision which, as noted, did not involve aid to individuals at all), would, if carried to its logical conclusion, effectively preclude religiously–oriented individuals from receipt of most state benefits. In actuality, however, this Court has rejected such a narrow focus, most recently in *Widmar v. Vincent*, *supra*. *Widmar* involved the question of whether state university facilities generally available to all student groups could be used by student religious groups holding religious services. Upholding such use against the contention that it offended the second test of *Lemon*, the Court rejected the suggestion that the focus should be solely on the particular use made of the state facilities by the religious groups in question, without recognition of the fact that the facilities were available on equal terms to a broad class of non–religious as well as religious groups and activities. As the Court stated: "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect [citations omitted]. If the Establishment Clause barred the extension of general benefits to religious groups, 'a Church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'" *Widmar*, *supra*, 454 U.S. at 274–75 (quoting *Roemer*, *supra*, 426 U.S. at 747).

Finally, the Washington Court erred in its analysis under the second prong of the *Lemon* test by insufficiently weighting the fact that Petitioner will utilize the sought–after assistance in connection with attendance at an institution of higher education, rather than a primary or secondary school. As this Court has previously made clear, the concern that government not appear to sponsor religious activity is — while still an important consideration — less implicated in situations involving schools of higher education, given the greater maturity and lesser impressionability of the students and the voluntary nature of their attendance. *See Widmar v. Vincent*, *supra*, 454 U.S. at 274 n.14; *Tilton v. Richardson*, *supra*, 403 U.S. at 685–86.

In sum, the Washington Court erred in holding that the aid given to Petitioner here violated the second test of *Lemon* in that its primary effect was to advance religion. As for the third test of *Lemon* — that the aid not foster an excessive government entanglement with religion — the Washington Supreme Court declined to determine whether or not the test had been met, holding that such an inquiry was "ill–suited to this case." 629 Wn.2d at 630, 689 P.2d at 57. In so concluding, the Washington Court implicitly — and properly — found that there is nothing about the State of Washington's program for vocational assistance to the blind that remotely hints at such an entanglement.[2] Accordingly, the decision of the Washington Supreme Court that the providing of assistance to the Petitioner in this case violates the Establishment Clause must be reversed.

Having so reversed, however, this Court need not, and should not, go on to decide the additional question under the Free Exercise Clause raised by Petitioner. Rather, this Court should remand to the Washington Court for determination of the state law issues raised in this case. The Free Exercise issue raised by Petitioner — *i.e.*, whether the state can consistent with the Free Exercise Clause deny grants for vocational training for the ministry when such grants are available to a given group for virtually all other vocations and trades — is not merely a difficult issue but one not properly before this Court. The Commission's sole ground for denying Petitioner's application was its view that such a grant is prohibited by the Washington State Constitution. Petitioner properly raised the state–law issue below, but the Washington Court, diverted by its erroneous analysis under the United States Constitution, failed to decide it. A decision that the assistance sought by Petitioner Witters is not barred

---

2 The absence of such potential entanglement between state and religion (among other factors) distinguishes this case from *Bender v. Williamsport Area High School*, 741 F.2d 538 (3d Cir. 1984), *cert. granted*, 53 U.S.L.W. 3597 (U.S. Feb. 19, 1985) (No. 84–773).

by the Washington State Constitution would obviate the need to address the thorny Free Exercise issue. This Court has previously recognized the desirability, where feasible, of resolving cases upon narrow state law issues rather than upon broad and potentially difficult constitutional grounds. *See Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947) (dismissal of appeal in favor of clarification by state court of issues of state law). There will be time enough to deal with those latter issues if and when a ruling by the Washington Supreme Court on the meaning of that state's own "Establishment Clause" makes such course necessary.

Accordingly, this Court, after correcting the Washington Court's erroneous conclusion regarding the Establishment Clause, should remand for a determination of Petitioner's eligibility under state law.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Washington should be reversed and the case remanded.

Dated: June 6, 1985

Respectfully submitted,

SAMUEL RABINOVE
THE AMERICAN JEWISH COMMITTEE
165 East 56 Street
New York, New York 10022
(212) 751–4000
Attorney for Amicus Curiae

Of Counsel:

JED S. RAKOFF
JAMES NISS
ELLEN B. COHN

RICHARD T. FOLTIN
The American Jewish Committee